

Rep. Nadler Calls on Mukasey to Appoint Special Counsel

Monday, 04 February 2008

WASHINGTON, D.C. – Congressman Jerrold Nadler (NY-08), Chair of the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, today called on Attorney General Mukasey to appoint a special counsel to investigate the President's apparent violation of law in asking the National Security Agency to eavesdrop, without warrants, on Americans' international phone calls. Mukasey is scheduled to appear before the House Judiciary Committee on Thursday.

In a letter to the Attorney General, Nadler noted that the Mukasey's "statutory duty to appoint a special counsel is clear and undeniable."

"The President's warrantless wiretapping program runs counter to our Constitution and the rule of law," said Rep. Nadler. "An independent and unbiased investigation, free from political pressure, is the best way to find the truth and restore the nation's confidence in the government."

The full text of Congressman Nadler's letter to Attorney General Mukasey follows:

February 5, 2008

The Honorable Michael Mukasey

Attorney General

Department of Justice

950 Pennsylvania Avenue NW

Washington, D.C. 20530

Dear Mr. Attorney General:

I write to renew my earlier requests that a special counsel be appointed to investigate the President's secret directive that authorized domestic eavesdropping on United States citizens, without a warrant, by the National Security Agency (NSA). This unprecedented intelligence gathering is clearly prohibited by law.

I first asked then Attorney General Alberto Gonzalez to appoint a special counsel in a letter dated December 19, 2005, which I reiterated in my letter of July 26, 2006. Although Attorney General Gonzalez did not act during his tenure, I believe the need for outside special counsel to investigate and prosecute any and all criminal acts committed by any member of the Executive Branch in the warrantless surveillance of people in the U.S. by the NSA is more pressing today than ever.

The President and others in the Administration justified warrantless surveillance, which was conducted in clear violation of the plain language of the Foreign Intelligence Surveillance Act, by claiming "inherent" Presidential power under Article II of the Constitution. Further, the Administration has argued that Congress implicitly authorized such action in the Authorization of the Use of Military Force (AUMF).

The President's reliance on the same two sources of alleged authority to establish military tribunals to try Guantanamo detainees was specifically rejected by the Supreme Court in *Hamdan v. Rumsfeld*. The Court's rejection of the Administration's broad assertions of power based on the President's Article II powers and the AUMF has clear implications for the NSA's warrantless surveillance program, and suggests that the President lacked lawful authority to authorize warrantless wiretaps of persons in the United States.

The President has stated that the Attorney General and the White House counsel were part of the decision to initiate this eavesdropping, and, since its public discovery and disclosure, top Department officials — including former Attorney General Gonzales — consistently have defended its lawfulness.

Certainly these circumstances — authorization and defense of alleged serious felonies by the President and top Justice Department officials — present a "conflict of interest for the Department or other extraordinary circumstances" that warrant appointment of an outside special counsel. See 28 C.F.R. § 600.1. That counsel should investigate this matter thoroughly and prosecute any person found to have violated the Foreign Intelligence Surveillance Act (50 USC §1809), which provides that a person who "engages in electronic surveillance under color of law except as authorized by statute" is "guilty of an offense . . . punishable by a fine of not more than \$10,000 or imprisonment for not more than five years, or both."

It is unconscionable that the President would authorize the NSA to spy on Americans without legal authority, and that he states brazenly that he will continue to do so. His refusal to accede to the warrant process is an affront to the Constitution, the Rule of Law, and the American people. The President and his Administration must be compelled to obey the law and to cease violating the President's Constitutional duty to "take care that the laws be faithfully executed," and I strongly urge you to appoint an outside special counsel to investigate this matter. Only in this way can the courts determine the validity of the President's claim of legal authority to engage in conduct this clearly criminal under 50 USC §1809, and, if the courts so determine that there is no such legal authority, only in this way can we hold the President and the Administration accountable and protect American liberties.

Under these circumstances, your statutory duty to appoint a special counsel is clear and undeniable.

Sincerely,

Jerrold Nadler

Member of Congress

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